

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LIAOSHENG ZHANG,

Plaintiff,

v.

CHINA GATE, INC., HONEYWELL
INTERNATIONAL, INC., AMAZON
GLOBAL RESOURCES, INC., MICROSOFT
CORPORATION, HEWLETT-PACKARD
COMPANY,

Defendants.

CASE NO. C07-964RSM

ORDER GRANTING HONEYWELL
INTERNATIONAL, INC.'S MOTION TO
DISMISS

I. INTRODUCTION

This matter comes before the Court on defendant Honeywell International Inc.'s ("Honeywell") Motion to Dismiss (Dkt. #3). Defendant argues that plaintiff's claims are barred by the first-to-file rule due to a similar action involving the same parties in United States District Court in the District of Arizona. Defendant also argues that plaintiff's second claim¹ for relief against defendant is based upon a statute that provides no private right of action. Lastly,

¹ Plaintiff's second claim against the defendant Honeywell appears as plaintiff's fifth claim for relief in her complaint. Plaintiff's first claim against defendant Honeywell alleges breach of contract and appears as plaintiff's fourth claim for relief in her complaint.

1 defendant argues that plaintiff's third claim² for relief is based upon proposed federal legislation
2 that has not been passed into law.

3 Plaintiff responds that the federal lawsuit in Arizona is based under Title VII and the Age
4 Discrimination in Employment Act ("ADEA"), and therefore argues that she is entitled to proceed
5 in this Court. With respect to her claims under 8 U.S.C. § 1182, plaintiff responds that she has
6 made attempts to solve this problem administratively. As to plaintiff's claim regarding the
7 proposed federal legislation, plaintiff did not address defendant's argument.

8 For the reasons set forth below, the Court GRANTS defendant's motion and DISMISSES
9 plaintiff's case against defendant Honeywell.

10 II. DISCUSSION

11 **A. Background**

12 Plaintiff, appearing pro se, is a foreign national who gained employment with Honeywell,
13 Inc. ("Honeywell") on June 30, 1998. *See* Plaintiff's Compl., ¶ 4.2.1. On April 1, 1999,
14 Honeywell sponsored plaintiff on an H1B visa, which was valid for a maximum period of six
15 years. On April 1, 2005, plaintiff's visa expired and her employment with Honeywell ended.
16 Plaintiff alleges that after the termination of her employment, she was not paid a severance
17 package that was promised to her by defendant Honeywell as an employment benefit. *See id.* at ¶
18 4.2.7; 8.1.³ Soon thereafter, plaintiff attempted to reapply at Honeywell on over 200 different
19 occasions to no avail. Plaintiff alleges that although she was qualified, she was never hired or
20 interviewed by defendant. She also states that during this period, defendant hired a substantial
21 amount of foreign workers from 2005 through 2007. As a result, plaintiff brought the instant
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23 ² Plaintiff's third claim against defendant Honeywell appears as plaintiff's sixth claim for
24 relief in her complaint.

25 ³ Plaintiff also indicates in her complaint that she was involved in a car accident on October
26 25th, 2005. The Court finds this fact irrelevant as plaintiff's employment with defendant
27 terminated on April 2, 2005. *See* Plaintiff's Compl. ¶ 4.2.4 - 4.2.7.

1 action against defendant, alleging (1) breach of contract, (2) violation of 8 U.S.C. §
2 1182(n)(2)(G)(ii) due to their alleged discriminatory hiring practices, and (3) violation of the H1B
3 and L1 Visa Fraud and Abuse Prevention Act of 2007.

4 **B. Standard of Review**

5 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must dismiss a
6 complaint if a plaintiff can prove no set of facts in support of her claim which would entitle her to
7 relief. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Sprewell v.*
8 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Love v. United States*, 915 F.2d
9 1242,1245 (9th Cir. 1989). In deciding a motion to dismiss, the Court accepts as true all material
10 allegations in the complaint and construes them in the light most favorable to the plaintiff. *See*
11 *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002); *Associated Gen. Contractors*
12 *v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998). However, conclusory allegations of
13 law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Associated Gen.*
14 *Contractors*, 159 F.3d at 1181.

15 Furthermore, when a Complaint is dismissed for failure to state a claim, “leave to amend
16 should be granted unless the court determines that the allegation of other facts consistent with the
17 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*
18 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

19 **C. First-to-File Rule**

20 Under the first-to-file rule, “when two identical actions are filed in courts of concurrent
21 jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose
22 would be served by proceeding with a second action.” *Pacesetter Systems, Inc. v. Medtronic,*
23 *Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). The rule is not a rigid or inflexible rule to be mechanically
24 applied, but should be applied in a manner serving sound judicial administration. *Id.*

25 Furthermore, to ascertain whether successive causes of action are the same, federal courts
26 examine four criteria: (1) whether the rights or interests established in the prior judgment would

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1 be destroyed or impaired by prosecution of the second action; (2) whether substantially the same
2 evidence is presented in the two actions; (3) whether the two suits involve infringement of the
3 same right; and (4) whether the two suits arise out of the same nucleus of facts. *See Constantini*
4 *v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982); *see also Adams v. California*
5 *Dep't. of Health Servs.*, 487 F.3d 684 (9th Cir. 2007).

6 In the instant case, there is no dispute that the federal lawsuit in Arizona commenced on
7 April 27th, 2006, well before plaintiff commenced her action in this Court on June 21st, 2007. *See*
8 *Zhang v. Honeywell International, Inc.*, CV06-1181-PHX-MHM. In addition, the two actions
9 share a common transactional nucleus of facts, and the same evidence would clearly be presented
10 in the two actions. Although plaintiff alleges that she is asserting claims based on Title VII and
11 the ADEA in the federal lawsuit in Arizona, plaintiff cannot hide under 8 U.S.C. § 1182 to
12 disguise the true nature of her claim in this Court which involves similar facts and circumstances.
13 Both federal lawsuits involve claims made against defendant Honeywell arising out of the alleged
14 lack of benefits provided to plaintiff after her employment with defendant Honeywell terminated.
15 It would be a complete waste of judicial resources for plaintiff's claim to proceed in this Court
16 while the federal lawsuit in Arizona is pending. As a result, the Court shall dismiss with prejudice
17 plaintiff's fourth claim for relief against defendant Honeywell.

18 **D. Plaintiff's 8 U.S.C. § 1182 Claim**

19 8 U.S.C. § 1182 essentially controls the admission qualifications for aliens in this country.
20 Further, § 1182(n) specifically governs the requirements employers must follow to provide an
21 alien with an H1B visa. *See* 8 U.S.C. § 1182(n)(1). In addition, § 1182(n) contains a
22 comprehensive regulatory enforcement scheme that entrusts the investigation of complaints that
23 aliens may have to the Secretary of Labor and the Attorney General. *See* 8 U.S.C. §
24 1182(n)(2)(A)-(n)(5)(A). Under this specific section of the statute, an aggrieved party must first
25 file a complaint with the Wage and Hour Division of the U.S. Department of Labor, which then
26 makes a determination of the validity of the complaint. *Id.* If the party is dissatisfied with this

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1 decision, it can then make an appeal to an administrative law judge. 20 C.F.R. §§ 655.815,
2 655.820, 655.840. If this decision is also unsatisfactory to the aggrieved party, it can then
3 petition for review to the Secretary of Labor. 20 C.F.R. §§ 655.840, 655.845. Only until these
4 steps have been followed, may an aggrieved party pursue remedies at the appropriate United
5 States District Court. 20 C.F.R. § 655.850.

6 Furthermore, federal courts have recognized that Congress did not intend to provide a
7 private right of action for individuals to enforce violations of § 1182(n) unless the aggrieved party
8 exhausts her remedies as outlined in the statute. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418
9 (4th Cir. 2005); *see also Shah v. Wilci Systems, Inc.*, 126 F.Supp.2d 641 (S.D.N.Y. 2000).

10 In the instant case, plaintiff has not followed these steps, and therefore no private right of
11 action exists. Plaintiff has merely indicated in her response that she has sent complaints to the
12 Department of Labor and to the Department of Justice. There has been no appeal made to an
13 administrative law judge, nor has there been a petition for review to the Secretary of Labor.
14 Although plaintiff has begun pursuing her administrative remedies, she has not come remotely
15 close to exhausting them, thereby precluding the Court from entertaining her arguments.
16 Consequently, plaintiff does not state a claim for which relief can be granted under Federal Rules
17 of Civil Procedure 12(b)(6). Moreover, while the Court recognizes that leave to amend should
18 generally be granted, no such leave is necessary where the deficiencies cannot be cured. *See*
19 *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578 (9th Cir. 1983). Here, no
20 circumstances presently exist that could possibly allow plaintiff to have a cognizable claim against
21 the defendants with regard to § 1182. As a result, the Court shall dismiss with prejudice
22 plaintiff's fifth claim of relief in her complaint as to defendant Honeywell.

23 **E. Plaintiff's H1B and L1 Visa Fraud and Abuse Prevention Act Claim**

24 Plaintiff's last claim of relief against defendant is based on the H1B and L1 Visa Fraud and
25 Abuse Prevention Act of 2007. While the Act was introduced as a proposed bill on March 29th,
26 2007, it has merely been referred to the Senate Committee. S. 1035, 110th Cong. (2007). The

1 Act is merely a bill at this stage and not governing law which the Court may follow, and therefore
2 the plaintiff has no colorable federal claim with respect to this Act. As a result, the Court shall
3 dismiss with prejudice plaintiff's sixth claim of relief in her complaint as to defendant Honeywell.

4 **III. CONCLUSION**

5 The Court GRANTS defendant Honeywell International Inc.'s Motion to Dismiss (Dkt.
6 #3), and this case with respect to this defendant is DISMISSED with prejudice.

7 The Clerk is directed to send a copy of this Order to all counsel of record.

8 DATED this 7th day of September, 2007.

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10 RICARDO S. MARTINEZ
11 UNITED STATES DISTRICT JUDGE
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